SUPREME COURT, U. S.

APR 4 1974

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1477

BOBBY A. PRICE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

* *

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

* *

PETITION FOR WRIT OF CERTIORARI

* *

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* *

The petitioner, Bobby A. Price, prays that a writ of certiorari issue to review the Judgment made by the Supreme Court of Virginia, entered Janurary 14, 1974, re-affirming petitioner's conviction by the Corporation Court of Danville, Virginia.

OPINIONS BELOW

There are two opinions of the Supreme Court of Virginia which are relevant to this

petition. In Price v. Commonwealth, 213 Va. 113, 189 S. E. 2d. 324 (1972) the Virginia Court affirmed Price's twelve month jail sentence for exhibiting an obscene motion picture. Price petitioned for certiorari to this Court and on June 25, 1973, this Court granted Price a Writ of Certiorari, vacated the judgment against him, and remanded the case to the Virginia Court for further consideration in light of Miller v. California, 413 U. S. 15, 37 L.ed. 2d. 419, 93 S.Ct. 2789 (1973) and other obscenity cases. On reconsideration the Supreme Court of Virginia reaffirmed Price's conviction. Price v. Commonwealth _____ Va. _____, _____ S.E.2d. _____ 1974. Both opinions are appended to this petition for certiorari. The more recent opinion appears first.

JURISDICTION

The Judgment of the Corporation Court of the City of Danville, Virginia, convicting petitioner of the crime of exhibiting an obscene motion picture in violation of the Virginia Code annotated Section 18.1-230 (Cum Supp 1971) was made and entered on April 1, 1971. Petitioner's relief in the Virginia Courts was exhausted when his conviction was affirmed by the Supreme Court of Virginia on June 12, 1972 and reaffirmed (after the case was vacated and remanded by this Court) on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

I. Whether the Virginia Obscenity Statute under which the defendant was convicted and sentenced to prision is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution because it is unconstitutionally vague and because it fails to meet the requirements of the First and Fourteenth Amendments to the United States Constitution.

II. Whether the petitioner was denied his basic rights under the First and Fourteenth Amendments to the United States Constitution and his right to due process of law secured by the Fourteenth Amendment to the United States Constitution by his conviction of "Exhibiting an obscene motion picture" and whether, under the law as it stood at the time of petitioner's conduct, the motion picture was obscene considering its content together with the fact that its dissemination was limited to adults and that adequate precautions were taken to prevent intrusions upon the sensibilities of unwilling viewers.

III. Whether the petitioner was denied his rights under the First and Fourteenth Amendments to the United States Constitution by the trial court's instruction of the jury that if it found the defendant was the manager of the North Theater and if it found the motion picture

was obscene beyond reasonable doubt, it should find the defendant guilty as charged, which instruction totally omitted the requirement of knowledge or scienter on the part of the defendant; and whether the instruction, held erroneous by the Supreme Court of Virginia, was harmless beyond a reasonable doubt because the motion picture was X-rated and because the defendant hired a security guard to insure that persons under twenty-one years of age were not admitted to the motion picutre.

IV. Whether the trial court violated petitioner's rights under the First and Fourteenth Amendment to the United States Constitution by refusing to instruct the jury to consider in determining if the film was obscene whether or not the defendant took adequate precautions to insure that the film could not be viewed by juveniles and took adequate precautions to see that no unwilling adult was exposed to the film and used no pandering or offensive advertising to promote the film.

V. Whether the trial court deprived petitioner of due process of law in violation of the Fourteenth Amendment to the United States Constitution by instructing the jury that the issue of obscenity should be determined by the Roth-Memoirs tests and by failing to explain those tests in any way.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 18.1-230 of Virginia Code Annotated (Cum. Supp. 1971):

Obscene exhibitions and performances--Every person who knowingly:

(1) Produces, promotes, prepares, presents, manages, directs, carries on or participates in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theater, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theater or an officer of such entity, and has no financial interest in such theater other than receiving salary and wages; or

(2) Owns, leases or manages any theater, garden, building, structure, room or place and leases, lets, lends or permits such theater, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or who fails to post prominently therein the name and address of a person resident in the locality who is the manager of such theater, garden, building, structure, room or place shall be guilty of a misdemeanor.

Section 18.1-227 of the Virginia Code Annotated (Cum. Supp. 1971):

> §18.1-227. 'Obscene' defined. --The word 'obscene' where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. (1960, c.233)

STATEMENT OF THE CASE

In late December, 1970, and early January, 1971, a film entitled "Anomalies" was exhibited at the North Theater in the City of Danville, Virginia. The theater was managed by defendant, Bobby A. Price. (Tr. 236, 237) The film depicted and discussed sexual deviations among human beings. (Tr. 245) The newspaper advertisements made it clear that the film was X-rated and might be offensive to certain viewers. (Tr. 40) The management placed a security guard between the entrance door and the ticket office to insure that no unmarried persons under the age of 21 years entered the movie house. (Tr. 287- 289)

Defendant Price was tried by a jury on the charge of exhibiting an obscene motion picture, "Anomalies", in violation of Virginia Code Annotated Section 18.1-230 (Cum. Supp. 1971). The jury

found him guilty and fixed his punishment at confinement in jail for twelve months and the payment of a fine of $1,000.00. The Supreme Court of Virginia granted defendant a writ of error and affirmed his conviction. Price petitioned for certiorari to this Court. On June 25, 1973, this Court granted Price a Writ of Certiorari, vacated the judgment against him, and remanded the case to the Supreme Court of Virginia for further consideration in light of Miller v. California, 413 U. S. 15, 37 L.ed. 2d. 419, 93 S.Ct. 2789 (1973) and other osbcenity cases. Subsequently, on January 14, 1974, the Supreme Court of Virginia reaffirmed Price's conviction and prison sentence.

At the trial the Commonwealth offered the testimony of a number of witnesses. Most had been selected by the chairman of the city's Decent Literature Committee. If the testimony of any of these witnesses is any indication, this Court may be called upon to spend much of its time in the future determining whether books and films have sufficient "serious" literary, artistic, political or scientific value so that other adults may be permitted to view them. For example, the witnesses found that the films "Killing of Sister George", "Midnight Cowboy", and "Three in the Atic", were all unacceptable or "below" local community standards. (Tr. 78-79 and 122).

The witnesses for the Commonwealth denied that the movie was educational or had any other sort of social value. The reason for their belief, apparently, was that they did not approve of the sort of information conveyed in the film. For example, Mr. W. H. Funk testified: "Well, I cannot say it was educational in any respect because the things that we saw there were things that I don't think anyone would care to learn." (Tr. 86) (See also Tr. 48) A number of the witnesses for the Commonwealth thought the film should be banned because it advocated offensive ideas. Mr. Kirby Wright testified that the movie advocated toleration of certain "deviant" sexual activity:

> To me, it was trying to suggest to you that this was alright... Although these acts, to me, were abnormal, they were saying it was alright to go ahead and do this because you might not, well, you couldn't contract veneral disease if you performed the act this way and the girls didn't have to worry about being pregnant, and so forth. (Tr. 35)

Other witnesses testified that the movie attempted to portray abnormal types of sex in such a way as to indicate that this may be normal among many people. (Tr. 103 and 116)

On remand from the Supreme Court of the United States, Price's case was

once again briefed and argued before the Supreme Court of Virginia. Price contended that the Virginia Obscenity Statute under which he was convicted and sentenced to prison was unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution because it was unconstitutionally vague and because it failed to meet the other requirements of the First and Fourteenth Amendments to the United States Constitution. The Virginia Court considered Price's argument on the merits and rejected it. See Burnette v. Commonwealth, 194 Va. 785, 75 S. E. 2d. 482 (1953).

During the trial of this case Price moved to strike the Commonwealth's evidence on the ground that the Commonwealth had failed to establish that the film, in light of the circumstances of its distribution, was obscene and because all of the evidence indicated that the film was not obscene. (Tr. 252-257, 293) Price's motion to strike the Commonwealth's evidence was overruled.

At the proper time the defendant requested the trial court to instruct the jury that it could consider factors such as whether adequate precautions were taken to insure that the film could not be viewed by juveniles and whether adequate precautions were taken to see that no unwilling adult was exposed to the film and whether the defendant had used pandering or offensive advertising to

promote the film, in determining whether or not the defendant was guilty and the film was obscene. Defendant's requested instruction was refused.

Instead the court simply instructed the jury:

> that the test to determine obscenity is as follows: Whether to the average person, applying contemporary community standards:
>
> (1) The dominant theme of the material taken as a whole appeals to a prurient interest in sex, that is, a shameful or morbid interest in nudity and sex; (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material is utterly without redeeming social value.

The trial court also instructed the jury that if it believed from the evidence beyond reasonable doubt that the defendant was the manager of the theater where "Anomalies" was exhibited and if the jury believed the Commonwealth had proved beyond a reasonable doubt that the film was obscene, then it should find the defendant guilty. Defendant excepted to the instruction in apt time. (Tr. 291)

While the Supreme Court of Virginia recognized that the instruction was im-

proper, it concluded that it was harmless beyond a reasonable doubt since Price was the manager of the theater when the film was shown, since he had hired a security guard to prevent persons under 21 from entering the theater, and since the movie was X-rated.

As noted above, the Supreme Court of Virginia reviewed petitioner's conviction which had resulted in a one year active prison sentence and a $1,000.00 fine. On June 12, 1972, the Supreme Court of Virginia affirmed petitioner's conviction. This Court granted petitioner's petition for certiorari, and vacated the judgment of the Supreme Court of Virginia and remanded the case for further consideration. On further consideration, the Supreme Court of Virginia reaffirmed petitioner's conviction in an opinion dated January 14, 1974.

ARGUMENT

The decision below should be reviewed because the Supreme Court of Virginia decided federal questions of substantial importance about which there is confusion among state and federal courts, and decided these federal questions in a way probably not in accord with the applicable decisions of this Court.

I. Petitioner's rights under the First and Fourteenth Amendments were denied by his conviction for exhibiting an obscene motion picture since the Virginia obscenity statute under which petitioner was convicted and sentenced to prison is unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution and because the statute otherwise fails to meet the requirements of the First and Fourteenth Amendments.

The question of the constitutionality of the Virginia obscenity statute was properly raised in Price's brief on remand from the Supreme Court of the United States (appellant's brief on remand p. 9). The Virginia Court considered Price's attack on the statute on its merits and rejected his contentions. Price v. Commonwealth (II) _____ Va. _____, _____ S.E.2d. _____, (1972). See Burnette v. Commonwealth, 194 Va. 785, 75 S.E.2d. 482 (1953).

A crucial issue in this case is the constitutionality of the Virginia obscenity statute as construed in light of this Court's decision in Miller v. California 413 U. S. 15, 37 L.ed. 2d. 419, 93 S.Ct. 2789 (1973). See Virginia Code Annotated Section 18.1-230 and Section 18.1-227 (Cum. Supp. 1971); House v. Commonwealth, 210 Va. 121, 169 S.E.2d. 552 (1969). As construed, the

Virginia statute required that the dominant theme of the material taken as a whole appeal to a prurient interest in sex; that the material be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and that the material be utterly without redeeming social value. Id.

In Miller v. California 413 U. S. 15, 37 L.ed. 2d. 419, 93 S.Ct. 2789 (1973), this Court engaged in another of its periodic and heroic attempts to define "obscenity." Roth v. United States, 354 U. S. 476, 1 L.ed. 2d. 1498, 77 S.Ct. 1304 (1957); Memoirs v. Massachusetts, 383 U. S. 413, 16 L.ed. 2d. 1, 86 S.Ct. 975 (1966); Miller v. California, supra. As a result of the Miller decision, Section 18.1-230, which incorporates Section 18.1-227 and the Memoirs test is unconstitutional on its face and as applied to the defendant in this case because it is unconstitutionally vague and because it fails to incorporate standards held constitutionally required by this Court in its most recent definition of obscenity.

In Miller, all members of this Court seemed to have abandoned the Roth-Memoirs tests and to have recognized that it was unconstitutionally vague. As the Chief Justice noted in Miller v. California,

413 U. S. 15, 37 L.ed.2d. 419, 93 S.Ct. 2789 (1973):

> The case we now review was tried on the theory that California Penal Code Section 311 approximately incorporates the three stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author and no member of the Court today supports the Memoirs formula.

As Mr. Justice Brennan noted in his dissent in Paris Adult Theater v. Slaton, 413 U. S. 49, 37 L.ed.2d. 446, 473, 93 S.Ct. _____ (1973):

> Although we have assumed that obscenity does exist and that we "know it when (we) see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

To replace the discarded Memoirs formula, the Court wrote a new three-part test and in addition confined the scope of permissible state regulation to works "which depict or describe sexual conduct." The Court held that such "conduct must be specifically defined by the applicable state law, as

written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U. S. 15, 37 L.ed.2d at 430-431 (1973).

The new requirements were set forth by this Court for the first time in its opinion in Miller. The new three-part test, the requirement of a list of the specific sexual conduct within the ambit of the statute, and the disapproval of the "utterly without redeeming social value" test and the "national standards" test all seem part of the Court's effort to reshape the unconstitutionally vague Roth-Memoirs standard into one which is constitutionally acceptable.

This Court's opinion in Miller supports the view that the "utterly without redeeming social value" test is unconstitutionally vague. For the Court noted that Memoirs "called on the prosecution to prove a negative; i.e., that the material was 'utterly without redeeming social value', a burden virtually impossible to dis-

charge under our criminal standards of proof."[1] Miller v. California 413 U. S. 15, 37 L.ed.2d. 419, 429 (1973). Indeed this Court cited with approval Justice Harlan's doubts as to whether or not the "utterly without redeeming social value test" had any meaning at all. And the Court rejected the concept of "social importance" as "ambiguous." 37 L.ed.2d. at 431.

[1]The Court in Miller also rejected the "national standards" test and indicated that it too was unconstitutionally vague. The Court noted that there are not and cannot be national standards for what appeals to the "prurient interest" or is "patently offensive."

This Court referred to the attempt to find a national "community standard" as "an exercise in futility," and it indicated that national standards are "unascertainable." Indeed the Court cited with approval Chief Justice Warren's opinion that there is "no provable 'national standard.'" Miller v. California 413 U. S. 15, 37, L.ed.2d. 419, 434-435 (1973).

In Miller this Court clearly indicated that the "utterly without redeeming social value" test is unconstitutionally vague. For surely a test which is "ambiguous" and meaningless, and "virtually incapable of proof," is also a test which is unconstitutionally vague. While a state may have a higher standard of proof than that required by this Court, it may not have a standard which is unconstitutionally vague. Of course, the "utterly without redeeming social value" test was present in the Virginia statute by judicial construction at the time of the defendant's conduct and of his trial. House v. Commonwealth, 210 Va. 121. 169 S. E.2d 552 (1969).

In addition to replacing the "utterly without redeeming social value" test and the "national standards" test, the majority of the Court took other steps clearly designed to surmount the vagueness problem. The majority concluded that:

> State statutes designed to regulate obscene materials must be carefully limited ... As a result we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by applicable state law as written or authoritatively construed. A state offense must also be limited to works

which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political, or scientific value.

--- Miller v. California, 413 U. S. 15, 37 L.ed.2d 419, 430 (1973)

The Court further noted:

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest ... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value ...

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra: (a) Patently

> offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. (Emphasis added.)
>
> --- Miller v. California 413 U. S. 15, L.ed.2d 419, 431 (1973)

By these changes, including the list of the specific sexual acts subject to regulation, this Court apparently believed that it surmounted the vagueness which was inherent in the Roth-Memoirs formula: "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." Miller v. California, 413 U. S. 15, 37 L.ed.2d 419, 432-433 (1973) -- Emphasis added.

The Virginia statute applied to this defendant did not define specific sexual conduct within the ambit of the statute. In a feeble attempt to find a sufficient

judicial construction prior to petitioner's conduct to put him on notice, the Virginia Court relied on its decision in House v. Commonwealth, 210 Va. 121, 127, 169 S.Ed.2d. 572, 577 (1969) where the Court held that a portryal of nudity, without evidence that the portrayal affronts the standards of the community, is not a sufficient basis for finding that a work is obscene. Of course this decision did not provide notice as to which portrayals were within the ambit of the statute.

The Virginia statute then is unconstitutional because one of its tests for obscenity, the "utterly without redeeming social value" test, is unconstitutionally vague. The applicable statute is also unconstitutional because it fails to include any definition of the specific sexual conduct or nudity within the ambit of the statute. Indeed, the United States Supreme Court vacated and remanded this case for further proceedings consistent with its decision in Miller.

Since there was no judicial construction of the Virginia obscenity statute providing notice as to which types of sexual conduct were within the ambit of the statute, one question remains: May the Virginia statute be authoritatively reconstrued, as it was in Price v. Commonwealth, so as to eliminate the vagueness problem with reference to this defendant whose conduct

occurred prior to any authoritative appellate construction of the statute?

No authoritative construction can be applied to the Virginia obscenity statute so as to sustain the conviction of this defendant.

A penal statute is void for vagueness when it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden by it. Lanzetta v. New Jersey, 306 U. S. 451, 453, 83 L.ed. 888, 59 S.Ct. 618 (1939). The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. A penal statute is unconstitutionally vague where men of ordinary intelligence cannot agree on its application. G.I. Surplus Stores, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962). A vague statute may also be unconstitutional because it fails to give the trier of fact sufficient guidance. The Virginia obscenity statutes involved, §18.1-227 and §18.1-230, fail to meet these tests.

At the time of this defendant's conduct, the Virginia statutes contained by construction the "utterly without re-

redeeming social value" test. Furthermore, the statutes did not (on their face or by appellate construction) contain a description of the sexual conduct which could be banned if the other obscenity tests are met. See, Goldstein v. Commonwealth, 200 Va. 25, 104 S.E.2d 66 (1958); Lee Art Theater, Inc. v. Commonwealth, 209 Va. 354, 164 S.E.2d. 655 (1968); House v. Commonwealth, supra. Under Miller v. California, supra, that conduct "must be specifically defined by the applicable state law as written or authoritatively construed." The Miller test, together with a specific description of sexual conduct, are both required for fair notice and to overcome the other vices of vagueness. As the Court noted in considering its new, more limited and concrete tests for obscenity, "... these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution". Miller v. California, supra.

At the time of the conduct of this defendant, the Virginia law had not been authoritatively construed as required by this Court. Indeed, in light of the interpretation of this Court, the defendant was on notice that the crime was virtually impossible to prove under criminal standards of proof. Miller v. California 413 U. S. 15, 37 L.Ed.2d. 419, 429 (1973). See United States v. Lang, et al., _____

F. Supp. ____, (DC CD Cal., 1973).

Of course, the defects in the statute may not be cured now, retroactively, after the defendant's conduct and after his trial. Ashton v. Kentucky, 384 U. S. 195, 16 L.ed. 2d 469, 471, 86 S.Ct. 1407 (1966); Shuttlesworth v. Birmingham, 382 U. S. 87, 15 L.ed. 2d 176, 86 S.Ct. 211 (1965). As the Court noted in Bouie v. Columbia, 378 U. S. 347, 12 L.ed.2d 894, 84 S.Ct. 1967 (1964):

> [W]here vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute'. For 'the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss...'

To attempt to write a constitutional statute and to provide the required notice for the first time either at the defendant's trial or on appeal would be the judicial equivalent of an ex post facto law and would violate the due process clause of the Fourteenth Amendment to the United States Con-

stitution. For at the time of the alleged crime and at the time of the defendant's trial, there was no constitutional definition of obscenity in Virginia. So the vague and unprovable guidelines of the Virginia statute may not be changed after the trial to those which the Supreme Court has indicated are now required.

A major factor in this Court's decision to change the standard from "utterly without redeeming social value" was the Court's conclusion that this standard was impossibly vague and could not be proved by the prosecution in accordance with the burdens of proof in a criminal trial. As a result, the Court has established standards which it believes are capable of proof and, therefore, easier to prove. "[L]aws which make conviction easier by changing the rules of evidence so that less or different evidence is required to convict are ex post facto as to prior offenses." 16A C.J.S., §446, p. 157. Calder v. Bull, 3 Dallas 386, 1 L.ed. 648 (1798). The changes which were required may not be applied to this defendant. For as Bouie v. Columbia, supra, teaches just as the state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. So the Vir-

ginia Court could not apply its newly arrived at construction to the defendant in this case.

In fact, that is precisely what the Supreme Court of Virginia did, although the result was thinly disguised. For the Virginia Court relied on its decision in House v. Commonwealth, 210 Va. 121, 169 S.E.2d 572 (1969) as a judicial construction in accordance with Miller. However, by reading House v. Commonwealth, 210 Va. 121, 169 S.E.2d. 572 (1969) this Court will find that such an interpretation is untenable. Although the Virginia statute included the "utterly without redeeming social value" test and although it did not include a description of the sexual conduct to be regulated, the Virginia Court rejected Price's contention that the statute was void for vagueness. The Virginia Court did not explain why the "meaningless" and "ambiguous" "utterly without redeeming social value" test measured up to constitutional requirements. Nor could the Virginia Court explain how it or the jury was able to accomplish the "virtually impossible" in this case. Its opinion really gives no satisfactory explanation of why the defendant should be committed to prision in view of the now universally recognized vagueness and inadequacies of the Roth-Memoirs test. Petitioner contends that the Virginia Court's decision is not consistent with this Court's

decision in Miller v. California, 413 U. S. 15, 37 L.ed.2d 419 (1973). For the decision in Miller is not, as the Virginia Court apparently believes, simply a green light for the states to proceed with the prosecution, conviction, and imprisonment of those charged with violating obscenity laws without regard to logical, legal, and constitutional problems. Rather the Court's opinion in Miller was a conscientous, serious and intellectually honest attempt to reshape the unconstitutionally vague Roth-Memoirs test into a test which is constitutionally acceptable. The effect of the Court's decision in Miller is not only to expand the power of the state to censor books, magazines, and films, but also to require the states to provide new and more concrete guidelines for those engaged in the hazardous occupation of selling books and magazines and film which deal with sexual conduct.

II. Petitioner's rights under the First and Fourteenth Amendments were denied by his conviction for exhibiting an obscene motion picture since the motion picture involved was not obscene under the law applicable at the time of petitioner's conduct.

In the present case the defendant received a jail sentence of twelve

months and a fine of $1,000.00 because, while he was manager of the North Theater in Danville, Virginia, the theater showed the film "Anomalies" to adults in an adult only movie theater. The film was advertised as X-rated (Tr. 40) and a security guard was employed by the manager to prevent unmarried persons under 21 years of age from entering the theater. (Tr. 287-289) The film was shown in an enclosed movie theater. In this situation it was virtually impossible for the film to reach children or unwilling viewers.

The film "Anomalies" depicted and explained various deviant sexual practices including masturbation and homosexuality. It consisted of a narrative which described and discussed these practices and a film portrayal in which they were simulated. The film contained standard psychological descriptions of the various deviant practices. It also discussed social issues of significance, such as the relationship between the social stigma attached to deviant behavior, the belief that sexual activity is moral only when engaged in with a view to reproduction, and the problem of excessive population.

Under the law applicable at the time of petitioner's conduct, material was not

obscene unless it was "utterly without redeeming social value." This test has now been rejected by the Court in Miller v. California, 413 U.S. 15, 37 L.ed.2d 419 (1973). Now the state need only prove that material lacked serious literary, artistic, political, or scientific value. However, to base a decision in petitioner's case on this standard is the judicial equivalent of an ex post facto law. Bouie v. Columbia, 378 U.S. 347, 12 L.ed.2d. 894, 84 S.Ct. 1967 (1964). As this Court recognized in Miller, the "utterly without redeeming social value" test was one which was virtually impossible to prove in accordance with criminal standards proof. It could not be satisfied in this case. For that reason, petitioner's conviction must be reversed.

In the present case the film was educational and dealt with sex in such a way as to advocate ideas. While the witnesses for the Commonwealth denied that the film was educational, the reason for their belief was that they did not approve of the sort of information being conveyed. For example, one of them testified: "Well, I cannot say it was educational in any respect because the things that we saw were things that I don't think anyone would care to learn." (Tr. 86) See also (Tr. 48)

Indeed the witnesses for the Commonwealth suggested that the film attempted to advocate toleration of deviant behavior. See e.g., (Tr. 35) Although the motion picture advocates ideas which witnesses for the Commonwealth found hateful, it is protected by the First Amendment to the United States Constitution. Even when a motion picture "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry," the Constitution nevertheless protects such ideas. Kinglsey Corp. v. Regents of U. of N. Y., 360 U. S. 684, 688-689, 3 L.ed.2d 1512, 1516, 79 S.Ct. 1362 (1959); Duggan v. Guild Theater, 258 A.2d 858 (Pa. 1969).

A number of courts which considered educational films and materials at least as explicit as those in the present case, found such films and materials protected under the "utterly without redeeming social value" test. United States of America v. "Language of Love", 432 F.2d 705 (2d Cir. 1970); Keuper v. Wilson, 268 A.2d 753 (Sup. Ct. N.J. 1970) United States v. Stewart, 336 F.Supp. 299 (D.C. Pa. 1971).

It is clear from the record in this case that the film does have social value. This fact is established by the defendant's witness Dr. Myron B. Liptzin, a psychiatrist with the University of North Caro-

lina Medical School at Chapel Hill, North Carolina. Dr. Liptzin testified that the film tends to satisfy people's curiosity and that such films are attended by married couples and produce a greater freedom to discuss matters between couples. The doctor also testified that the likely effect of a film such as this would be a satiating effect. (Tr. 202-205) He testified the film would appeal to a wide and general audience. (Tr. 205)

The doctor also testified that the film might be helpful to individuals with deviant tendencies although he testified that there was no evidence that it would appeal to them any more specifically than to the general population. (Tr. 206, 212):

> I think, perhaps, films such as this might help an individual who felt extremely guilty and ashamed and up tight about his own, what he considers to be his own, hangups, his own behavior, and the narrator in the film makes this point specifically, that he might learn that he's not alone having these feelings, that there's nothing so terribly wrong about this and that there is professional help available and might cause a person such as this to seek professional counseling and help. (Tr. 212)

Taken as a whole, all of the evidence establishes the film was not utterly without redeeming social value.

III. Petitioner's conviction deprived him of his rights under the First and Fourteenth Amendments to the United States Constitution because the trial court incorrectly instructed the jury that if it believed from the evidence beyond reasonable doubt that the defendant was the manager of the North Theater when the motion picture was exhibited and if the jury further believed from the evidence that the Commonwealth had proved beyond a reasonable doubt the necessary elements as to what determines obscenity, then the jury should find the defendant guilty and fix his punishment. The Supreme Court of Virginia denied petitioner his rights under the First and Fourteenth Amendments to the United States Constitution when it ruled the instructions harmless beyond reasonable doubt.

Petitioner objected to the trial court's instruction in apt time (Tr. 291) on the ground that it omitted the requirement of criminal intent of which knowledge is an essential element. The issue was raised in petitioner's brief before the Supreme Court of Virginia (Defendant's Brief, p. 51) and was considered by the

Virginia Court. While the Supreme Court of Virginia recognized that the instruction was error, it held that "the lower court's failure to include the element of knowledge was harmless beyond reasonable doubt." The court arrived at this conclusion because defendant had hired a security guard to prevent persons under 21 from entering the theater and because the movie was advertised as X-rated. It found the evidence of scienter "overwhelming."

The Virginia Court was clearly correct in finding the instruction erroneous. Knowledge is, as it recognized, an essential part of the crime, House v. Commonwealth, 210 Va. 121, 169 S.E.2d 552 (1969), and is constitutionally required, Smith v. California, 316 U.S. 147, 4 L.ed.2d. 205, 80 S.Ct. 215 (1969). Without proof of knowledge the prosecution must fail, e.g., Commonwealth v. Corey, 351 Mass. 205, 221 N.E. 222 (Mass. 1966).

The court's conclusion that overwhelming evidence showed that the defendant knew the contents of this particular film is a non sequitur. First, it is obvious that many films which are X-rated are not obscene, at least when shown to adults. Indeed this Court can take judicial notice of the fact that a number of current movies ranging from "Ulysses" to "Midnight Cowboy" were X-rated but could

not conceivably be considered obscene under prior decisions of this Court. See Rabe v. Washington, 405 U.S. 313, 31 L.ed.2d 258, 92 S.Ct. 993 (1972). Nor is the fact that the manager hired a security guard to keep young persons from attending X-rated movies of any more significance. The fact that this petitioner took precautions to see that adults were forewarned as to the nature of films containing sexual matters and that fact that he took precautions to see that young persons were excluded from the film should not be used to justify the failure to submit to the jury the issue of whether petitioner knew the contents of a particular X-rated film.

In the present case it seems clear that the decision of the Virginia Supreme Court is contrary to prior decisions of this Court. E.g., Chapman v. California, 386 U.S. 18, 17 L.ed.2d 705, 87 S.Ct. 824 (1967).

IV. Petitioner was denied his rights under the First and Fourteenth Amendments to the United States Constitution by the trial court's failure to give petitioner's requested instruction that whether petitioner took adequate precautions to insure that the film could not be viewed by juveniles and whether he took adequate

precautions to see that no unwilling adult was exposed to the film and whether he used pandering or offensive advertising material to promote the film were issues which the jury should take into account in determining whether or not the film was obscene.

At petitioner's trial he requested instructions to the jury that they should consider whether or not he took adequate precautions to insure that the film could not be viewed by juveniles and took adequate precautions to see that no unwilling adult was exposed to the film and whether the petitioner used pandering or offensive advertising material to promote the film in determining whether or not the film was obscene and petitioner was guilty. The instructions were refused. Petitioner excepted and raised the issue in his brief before the Supreme Court of Virginia. (Petitioner's Brief, p. 49). The Virginia Court rejected petitioner's contention.

The trial court erred in refusing the instructions on whether or not the film could be viewed by juveniles or whether an unwilling adult was exposed to the film or whether pandering was used to promote the film. These are

relevant factors which should be taken into consideration in determining whether or not the film was obscene. See Rabe v. Washington, supra; Redrup v. New York, 386 U.S. 767, 18 L.ed.2d 515, 87 S.Ct. 1414 (1967); Ginzburg v. U. S., 383 U.S. 463, 86 S.Ct. 942, 16 L.ed.2d 31 (1966).

The issue is one of substantial importance and for that reason review should be granted by this Court.

V. Petitioner was deprived of his rights under the First and Fourteenth Amendments to the United States Constitution and was deprived of due process of law by the trial court's prejudicially inadequate instruction as to what constitutes obscenity.

The following instruction represents the entire instruction which the court gave the jury on the test to determine obscenity:

> THE COURT INSTRUCTS THE JURY that the test to determine obscenity is as follows: whether to the average person, applying contemporary community standards:

(1) The dominant theme of the material taken as a whole appeals to a prurient interest, that is a shameful or morbid interest in nudity and sex;

(2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

(3) The material is utterly without redeeming social value.

Petitioner objected to the instruction. (Tr. 291)

Petitioner raised the issue of the inadequacy of the instruction in his brief before the Supreme Court of Virginia. (Petitioner's Brief, p. 50). The court rejected his argument and held the instruction proper and adequate.

The instruction gave the jury little or no guidance. The Court explained to the jury that it should apply "contemporary community standards," but the court failed in its instruction to define the community or inform the jury that the standards to be used were those of the national community. Jacobellis v. Ohio, supra. Since the boundaries of the community were not established, the jury was left to guess what standard it was to apply and the petitioner was denied his

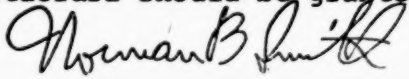
rights under the First and Fourteenth Amendments to the United States Constitution and his right to due process of law under the Fourteenth Amendment. State v. Locks, 397 P. 2d 949, 952 (Ariz. 1962). The trial court's failure to define the boundaries of the community in its instruction is error.

The court gave the jury no guidance in explaining to the jury how to arrive at contemporary community standards. Specifically, the court failed even to instruct the jury that it should consider the availability of similar material in the community in determining contemporary community standards and failed to inform the jury that community standards are to be judged by objective tests.

The court instructed the jury that the material must be utterly without redeeming social value but completely failed to explain this test. The court's failure is significant in view of the testimony of several witnesses that they had no idea what was meant by redeeming social value. There is no reason to believe that the jury was any better informed.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



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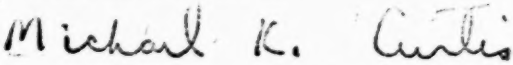

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APPENDIX TO PETITION

BOBBY A. PRICE

-v- Record No. 7880

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE GEORGE M. COCHRAN
Richmond, Virginia,
January 14, 1974

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

In Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972), we affirmed the judgment of the Circuit Court for the City of Danville sentencing Bobby A. Price to serve 12 months in jail and to pay a fine of $1,000 for exhibiting an obscene motion picture in violation of Code §18.1-230 (Cum. Supp. 1971). On June 25, 1973, the Supreme Court of the United States granted Price a Writ of Certiorari, vacated the judgment against him and remanded the case to us for further consideration in light of the decisions handed down on June 21, 1973, in Miller v. California, 413 U.S. 15 (1973), and companion cases.

The only new questions now presented to us are whether Code §18.1-230 is unconstitutionally vague or overbroad in light of the new test of obscenity promulgated in Miller, which established the following guidelines for the trier of fact to use in determining whether a work is obscene:

> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest,...
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24.

Part (a) of the Miller test requires no revision of our holding in Price. This aspect of the Miller test is not new, for the language of part (a) originated in Roth v. United States, 354 U.S. 476, 485 (1957). As Price expressly followed Roth in this respect, see 213 Va. at 115, 189 S.E.2d at 326, we find that Price complied fully with the requirements of part (a) of the Miller test.

Miller and Paris Adult Theatre I support our holding in Price, following Alexander v. Commonwealth, 212 Va. 554, 186 S.E.2d 43 (1972), that the community standard to be applied is that of the locality rather than that of the state or nation. Although Miller had no occasion to consider whether the use of local standards was constitutionally permissible, it held that national standards were not

constitutionally required and that state standards were constitutionally acceptable. In reaching this result the court noted that the diversity of our nation would prevent the effective formulation of a national standard of obscenity. 413 U.S. at 30. The court also relied on the Anglo-American tradition of allowing lay jurors to draw upon the standards of their community. Id.

The reasons given in Miller for holding that national standards are not constitutionally required in obscenity cases compel the same conclusion with respect to statewide standards. It would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide community standards. See e.g., Easterling v. Walton, 208 Va. 214, 218, 156 S.E.2d 787, 790 (1967), which restated the rule that a jury must apply local community standards in medical malpractice cases.

In Paris Adult Theatre I the Supreme Court rejected the contention that expert evidence of obscenity is required when the motion picture or other material is placed in evidence, 413 U.S. at 56, a

ruling that we had anticipated in Price. This ruling reinforces our conclusion that local community standards may be applied, for expert testimony would be required to establish statewide standards. See Miller, 413 U.S. at 31.

The main thrust of Price's argument is that the Virginia obscenity statute is void for vagueness or overbreadth under part (b) of the Miller test because the statute did not define with specificity the conduct which a work must portray to be held obscene. In Miller the Supreme Court stated that the conduct whose portrayal is proscribed must be specifically defined by statute, as written or as authoritatively construed. The court amplified this requirement by giving examples of descriptions that are sufficiently specific:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

The Virginia definition of obscenity is found in Code §18.1-227 (Cum Supp. 1971), which provides:

> "The word 'obscene'... shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

We have narrowed this definition by judicial construction. In House v. Commonwealth, 210 Va. 121, 127, 169, S.E.2d 572, 577 (1969), we reversed an obscenity conviction involving a magazine which featured pictures of nude and partially clothed men and women. There we held that a portrayal of nudity is not, as a matter of law, a sufficient basis for a finding that a work is obscene. See also Upton v. Commonwealth, 211 Va. 445, 447, 177 S.E.2d 528, 530 (1970). Thus, the Virginia obscenity law under which Price was convicted limits the class of works which might be found obscene to portrayals of sexual activity or excretion, not including mere nudity, which go beyond the customary limits of candor in representing such matters.

We conclude that the Virginia obscenity statute, as construed, prohibits only hard core pornography such as the examples delineated in Miller and does not restrict constitutionally protected speech and writing. We do not believe that the Miller examples were intended to preempt or standardize state obscenity statutes, for

the Supreme Court emphasized that it was not the court's function to propose regulatory schemes for the states. 413 U.S. at 25. Consequently, we hold that our obscenity law is not void for overbreadth.

We also conclude that the Virginia obscenity law is not void for vagueness. A statute regulating obscene materials is not void for vagueness if it provides "fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." Miller v. California, 413 U.S. at 27. "All that is required is that the language of the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Roth v. United States, 354 U.S. 476, 491 (1957). Thus, in Roth the court upheld over a challenge of vagueness a federal statute making punishable the mailing of material that is "obscene, lewd, lascivious, or filthy... or other publication of indecent character." In United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 130, n. 7 (1973), the court left open the issue of whether the words "obscene", "lewd", "lascivious", "filthy", "indecent" or "immoral" raised a serious doubt concerning the vagueness of a federal obscenity statute.

The Virginia obscenity statute, as construed, gives fair notice of the meaning of obscenity. We believe that a person of

ordinary understanding would have no difficulty in determining what sorts of material would be regarded as obscene under the statute.

We also find that the Price decision does not violate part (c) of the Miller test. The jury convicted Price after having been instructed that to find the motion picture obscene it must find that the film was "utterly without redeeming social value." After viewing the film we also reached the conclusion that it was obscene as thus defined. In light of these findings the film would necessarily be obscene under part (c) of the Miller test, which is broader and less rigorous than the test applied in Price. See People v. Enskat, _____ Cal. App.3d _____, 109 Cal. Rptr. 433, 13 Cr. L. Rpt. 2522 (1973), which held that Miller does not require reversal of state obscenity convictions under laws that define obscenity at least as narrowly as Miller did. Accord, United States v. Thevis, ____ F.2d _____, 14 Cr. L. Rptr. 2026 (5th Cir. 1973).

For the foregoing reasons we adhere to the views previously expressed, which we find consistent with Miller and its companion cases, and we reaffirm the conviction order of the trial court.

Affirmed.

BOBBY A. PRICE

-v- Record No. 7880

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE GEORGE M. COCHRAN
Richmond, Virginia,
June 12, 1972

FROM THE CORPORATION COURT OF DANVILLE
A. M. Aiken, Judge

Bobby A. Price, manager of the North Theatre in Danville, was indicted for exhibiting an obscene motion picture, "Anomalies", in violation of Va. Code Ann. Sec. 18.1-230 (Cum. Supp. 1971)[1]. He was tried by a jury which found him guilty and fixed his punishment at

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[1] "Sec. 18.1-230. Obscene exhibitions and performances.--Every person who knowingly:

"(1) Produces, promotes, prepares, presents, manages, directs, carries on or participates in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity,

confinement in jail for 12 months and payment of a fine of $1000. We granted Price a writ of error to the judgment entered on the verdict."

In late December and early January, 1971, the film was shown in Danville. It was advertised as X-rated (restricted to adult audiences), and a security guard was employed by the management to prevent unmarried persons under 21 years of age from entering the theatre.

After Price had been indicted, a consent order was entered enjoining the public exhibition of the film. Thereafter, the Commonwealth arranged for a number of local citizens, including members of the Mayor's Committee for Decent Literature, to view "Anomalies" at a private showing. Sixteen of

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and has no financial interest in such theatre other than receiving salary and wages; or

"(2) Owns, leases or manages any theatre, garden, building, structure, room or place and leases, lets, lends or permits such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or who fails to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place shall be guilty of a misdemeanor."

these persons testified as witnesses for the Commonwealth at Price's trial.

If "Anomalies" is obscene, it is not protected by the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment. Roth v. United States, 354 U.S. 476, 485 (1957). As more recent decisions of the Supreme Court have reflected divergent opinions which failed to gain majority approval we have felt constrained to follow the definition of obscenity set forth in Roth, 354 U.S. at 489, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth has been reaffirmed in United States v. Reidel, 402 U.S. 351 (1971). We have also acquiesced in the following amplification of the Roth definition set forth in a plurality opinion in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966):

> "...[T]three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the

> material is utterly without redeeming social value."

House v. Commonwealth, 210 Va. 121, 125, 169 S.E.2d 572, 575 (1969). See Hearn v. Short, 327 F.Supp. 33, 36 (S.D. Tex. 1971) (concurring opinion of Bue, J.).

Price's assignment of error to the lower court's ruling that the contemporary standard in issue was that of the local community rather than that of the national or statewide community has been resolved against him by Alexander v. Commonwealth, 212 Va. 554, 186 S.E.2d 43 (1972). There, noting that the Supreme Court had not been able to agree on a definition of the community by whose standards obscenity should be measured, we approved the local community standard.

Price has assigned error to the action of the lower court in permitting witnesses for the Commonwealth to express their personal opinions about "Anomalies" in testifying as to local community standards. He contends that in the absence of expert testimony on the subject his motion to strike the Commonwealth's evidence was improperly overruled. We do not agree. Although many of the witnesses did state their personal opinions, which were not evidence of community standards, they also testified that they were familiar with the contemporary community standards in the locality and that "Anomalies" was an affront to these

standards and had no social value. Price's reliance on House v. Commonwealth, supra, as requiring expert testimony, is misplaced. Evidence of contemporary community standards is required. Id. at 126, 169 S.E.2d at 576-77. Hence, expert testimony, if available, is admissible, but House does not require that experts be produced by the Commonwealth in order to obtain a conviction under the obscenity statute. Witnesses, whose familiarity with contemporary local community standards has been established, are qualified to testify as to such standards.

The sixteen witnesses testifying for the Commonwealth represented a limited cross-section of the Danville community. They came from different backgrounds and were citizens who had lived in Danville an average of 29 years each. To the extent that none represented morally depraved or disreputable elements of society, they did not comprise a true cross-section. They were representative of educational, religious, business, recreational and civic interests in the community. While not experts in the usual sense they were sufficiently expert to testify to the community standards in Danville. See Gent v. State, 239 Ark. 474, 393 S.W.2d 219 (1965), rev'd per curiam sub nom Redrup v. New York, 386 U.S. 767 (1967) (hereinafter the citation of cases reversed on the inconclusive authority of Redrup will be followed by (Redrup)); State v. Henry, 250 La. 682, 198 So.2d

889, rev'd per curiam 392 U.S. 655 (1967) (Redrup); State v. Childs, 252 Or. 91, 447 P.2d 304 (1968), cert. denied, 394 U.S. 931 (1969); Robert Arthur Management Corp. v. State, 220 Tenn. 101, 414 S.W. 2d 638, rev'd per curiam, 389 U.S. 578 (1967) (Redrup). Moreover, by stipulation it was agreed that there were five other Commonwealth witnesses summoned, whose occupations were not listed, who, if they had been called, would have given testimony similar to that of the sixteen who testified. So we are satisfied that no reversible error was committed in permitting some of the witnesses for the Commonwealth to give their personal opinions about "Anomalies" as well as their opinions that it violated the community standards with which they were conversant. It follows that the court properly overruled Price's motion to strike the Commonwealth's evidence as to standards.

Price contends that the lower court improperly excluded the testimony of his witness, David Flick, Director of the Danville Public Library. Flick was permitted to testify extensively, over objection, concerning the current popularity of certain books, e.g., Portnoy's Complaint, dealing with deviant sexual behavior, as indicative of an evolving standard of acceptance of sex in literature. According to Flick, the reading habits of library users in Danville had steadily changed in recent years to reflect an increasing interest in sex. This testimony was clearly relevant to a determination of contemporary community standards. See Woodruff v. State, 11 Md. App. 202,

273 A.2d 436 (1971).

Flick was not permitted to testify concerning the well attended motion picture "Fanny Hill", which he had viewed in a local theatre, the court ruling, out of the presence of the jury, that evidence as to that film was irrelevant to a consideration of "Anomalies." At the same time the court incorrectly ruled in retrospect, also out of the presence of the jury, that the testimony which Flick had given concerning the books was irrelevant and inadmissible. But this testimony about the change in reading habits of library users was never stricken nor did the court direct the jury to disregard it. So the ruling of inadmissibility was ineffectual and any error with respect thereto was harmless. Furthermore, as there was no proffer of the testimony to be given by Flick concerning "Fanny Hill", we cannot say that the lower court erred in refusing to admit such testimony, particularly in view of Flick's admission that he had not seen "Anomalies."

Price's assignments of error relating to the court's refusal to sustain his motions to strike the Commonwealth's evidence are based upon his contention that "Anomalies" is not obscene as a matter of law.

The Commonwealth witnesses described the film as having no plot or theme and as encouraging sexual devia-

tion rather than normal sexual activities. They testified that "Anomalies" depicted with implicit approval various kinds of perverted and depraved sexual conduct which violated contemporary community standards and had no social value[2]. At least two witnesses testified that the film appealed to the viewers' prurient interest. Before the Commonwealth's evidence was completed the jury was given a private showing of the motion picture.

Dr. Myron B. Liptzin, a psychiatrist at the University of North Carolina, was the only defense witness who had seen "Anomalies." He testified that the film had social value because it was entertaining and educational in that it would satisfy the curiosity of the audience. Dr. Liptzin admitted that "Anomalies" would cause sexual arousal in some persons and that a "peeping tom", viewing the film, would either masturbate during the exhibition or after the performance was over.

The jury, which heard all the evidence and also viewed "Anomalies", found Dr. Liptzin's testimony unpersuasive.

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[2] For example, E. Linwood Wright, a research chemist, termed the movie "a series of several sexual demonstrations of various sexual activities...masturbation, voyeurism, lesbianism, homosexuality, exhibitionism, troixism, things I consider aberrations."

Having approved a local community standard for determining obscenity, it follows that we would prefer to apply a "sufficiency of the evidence" scope of review to obscenity cases, as suggested by Chief Justice Warren's dissenting opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964). The evidence here was plainly sufficient to create a jury issue. However, while the Supreme Court has not definitively established the appropriate scope of review in obscenity cases, it appears that all First Amendment questions of "constitutional fact" will receive de novo review by that court. Rosenbloom v. Metromedia, 403 U.S. 29, 54 (1971). Moreover, the prevailing view appears to be that in obscenity cases the courts must make an independent determination of the constitutional issue of obscenity, which is a mixed question of law and fact. See, e.g., NGC Theater Corp. v. Mummert, 107 Ariz. 484, 489 P.2d 823 (1971); Village Books v. State's Attorney Prince George's County, 263 Md. 76, 282 A.2d 126 (1971); State v. Hartstein, 469 S.W.2d 329 (Mo.), rev'd per curiam, 92 S.Ct. 531 (1971) (Redrup); State ex rel. Sensenbrenner v. Adult Book Store, 26 Ohio App. 2d 183, 271 N.E.2d 13 (1971); Scuncio v. Columbus Theater, Inc., 277 A.2d 924 (R.I. 1971); State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 (1970), rev'd per curiam, 404 U.S. 806 (1971) (Redrup). But see, e.g., State v. McCluney, 11 N.C. App. 11, 180 S.E.2d 419 (1971); Moore v. State, 470 S.W.2d 391 (Tex. Civ. App. 1971); Court v. State, 51 Wis. 2d 683, 188 N.W.2d 475 (1971). Accord-

ingly, we have viewed "Anomalies."

The film purports to show that many abnormal sexual activities, which were formerly engaged in furtively, are now more widely practiced by persons who are no longer restrained by any sexual "hangups" or feelings of guilt. The activities are then explicitly demonstrated in a series of unrelated scenes in which the advantages ascribed to the deviant practices by devotees are mentioned. Except for occasional repetitive words uttered by the narrator, the sound track is limited to background music and assorted moans, groans and grunts supposedly emanating from the performers.

The testimony of Commonwealth witnesses accurately described "Anomalies" and we need not elaborate further. Under the Roth-Memoirs test we find that the film is obscene. Its dominant theme or purpose, taken as a whole, appeals to a prurient interest, that is a shameful or morbid interest, in sex. It is patently offensive because it affronts contemporary community standards relating to the description of sexual matters, whether the applicable community standards are local, statewide or national. The film is utterly without redeeming social value. If satisfying the salacious curiosity of the audience gives redeeming social value to "Anomalies", as Dr. Liptzin suggested in his testimony, then there can be no conviction under

the obscenity statute for exhibiting any motion picture. No doubt the film has entertainment value for sexual deviants and for other persons who may enjoy viewing simulated acts of sexual perversion. In our view this dubious distinction falls short of furnishing the redeeming social value contemplated by Memoirs. See State ex rel. Sensenbrenner v. Adult Book Store, supra at 210, 271 N.E.2d at 29.

Price has assigned error to the action of the lower court in overruling his motion to quash the indictment[3]. The motion to quash was based on the grounds that the indictment did not allege that the film was "utterly without redeeming social value" and that it used the term "substantially beyond customary limits of candor" rather than "patently beyond customary limits of candor." But, as the Attorney General

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[3] The indictment charged that Price "did, as manager of the North Theatre, permit such theatre to exhibit the motion picture "Anomalies", which said picture, when considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is a shameful or morbid interest in nudity, sex or excretion, and which go substantially beyond customary limits of candor in description or representation of such matters, in violation of Section 18.1-230 of the Code of Virginia, 1950, as amended, against the peace and dignity of the Commonwealth."

points out, the indictment was couched substantially in the language of the statute, there was no question that Price was advised of the charges which he was required to defend himself against, and the court's instructions cured any defect in the indictment of which Price complained. Price's attack on the indictment after trial for failure to incorporate the word "knowingly" came too late. McDougal v. Commonwealth, 212 Va. 547, 186 S.E.2d 18 (1972).

Price has assigned error to the refusal by the lower court to grant an instruction which in effect would have told the jury that the film could be found not obscene if adequate precautions were taken to prevent juveniles and unconsenting adults from viewing it and if no "pandering" or offensive advertising material was used to promote the film. This instruction was properly refused as it was not a part of the Roth-Memoirs test for obscenity heretofore approved in House v. Commonwealth, supra.

Price contends that Instructions

Nos. 1[4] and 2[5] were improperly given by the lower court. His objection to Instruction No. 1 when given was that it did not require any criminal intent, which he has since construed to mean knowledge or scienter. Assuming, without deciding, that in the context of the statute under review the terms are interchangeable, this objection was

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[4] "INSTRUCTION NO. 1

"THE COURT INSTRUCTS THE JURY that if you believe from the evidence beyond a reasonable doubt that the defendant, Bobby A. Price, was the manager of the North Theatre, when the motion picture "Anomalies" was exhibited, and if you further believe from the evidence that the Commonwealth has proved beyond a reasonable doubt the necessary elements as to what determines obscenity as set forth by another instruction of the Court, then you shall find the defendant guilty as charged in the indictment and fix his punishment at confinement in jail for not more than 12 months or by a fine not to exceed $1,000.00, or by both such fine and imprisonment."

[5] "INSTRUCTION NO. 2

"THE COURT INSTRUCTS THE JURY that the test to determine obscenity is as follows: whether to the average person, applying contemporary community standards:

"(1) The dominant theme of the

well taken. Since Sec. 18.1-230 applies only to persons who "knowingly" violate its provisions, knowledge was an essential element of the crime with which Price was charged and should have been included in Instruction No. 1. However, we believe that the lower court's failure to include the element of knowledge was harmless error beyond a reasonable doubt. All that was required was to show that Price exhibited the film knowing its content. Price was the manager of the North Theatre where "Anomalies" was shown for a period of several weeks. He hired a security guard to prevent unmarried persons under 21 from entering the theatre. The movie was advertised as X-rated and potentially offensive to some people. The evidence of scienter, although wholly circumstantial, was overwhelming. See State v. Vollmar, 389 S.W.2d 20, 29 (Mo. 1965).

Instruction No. 2, which conforms

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material taken as a whole appeals to a prurient interest, that is a shameful or morbid interest in nudity and sex;

"(2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

"(3) The material is utterly without redeeming social value."

with a similar instruction approved in House v. Commonwealth, supra, is a correct statement of law.

Price's last assignment of error is directed to the refusal by the lower court to grant a mistrial for allegedly improper argument by the Commonwealth's Attorney. It is apparent that one of Price's counsel as well as the Commonwealth's Attorney went outside the record in closing arguments. Each made statements, completely unsupported by evidence, which were irrelevant and improper. But objection was made by Price to only one of the Commonwealth's Attorney's remarks. Price made no further objections, asked for no cautionary instructions, and did not move for a mistrial until the jury had retired. Under these circumstances, his motion was not timely and was properly refused. Russo v. Commonwealth, 207 Va. 251, 148 S.E.2d 820 (1966), cert. denied, 386 U.S. 909 (1967).

For the reasons stated herein the judgment is

Affirmed.